The Government will introduce a new dispute resolution framework that will significantly improve outcomes for consumers and small businesses in the financial sector. There will be a new one-stop-shop – the Australian Financial Complaints Authority (AFCA) – for the resolution of financial disputes and greater transparency and accountability of firms’ internal dispute resolution practices.

# Improving the dispute resolution framework

In response to feedback received during consultation, the Government will make a number of improvements to the Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017 (the Bill), previously known as the Treasury Laws Amendment (External Dispute Resolution) Bill 2017.

***Accountability***

To ensure that AFCA is accountable to its users, and that it meets community expectations, the Government will enshrine in law AFCA’s governance arrangements:

* the composition of the AFCA board, with an independent chair and equal numbers of industry and consumer directors, will be enshrined in legislation;
* at the establishment of AFCA the Government will be able to appoint a minority of the AFCA board, including the independent chair (but will not be able to do so on an ongoing basis); and
* the Bill will require AFCA to be a not for profit company limited by guarantee.

This ensures that AFCA’s board has the skills and expertise to carry out its functions and to be accountable to all its users.

***Superannuation complaints***

As superannuation complaints will transition from a tribunal structure to an ombudsman scheme, key elements of the current complaints handling model, including the requirements for handling death benefit complaints (including time limits), the decision‑making test and the unlimited monetary jurisdiction, will be replicated in the Bill. This will provide certainty to stakeholders and will ensure that AFCA is established with the required processes in place to handle these types of disputes.

***Transitional arrangements***

The Bill will also be amended to require all current FOS and CIO members to remain members of the FOS or CIO for a period up to 12 months after AFCA commences.

This approach will provide Dr Edey and the transition team with the flexibility to determine the most appropriate way to address the resolution of legacy disputes of FOS and CIO, which could include:

* firms being required to remain members of FOS and CIO while they work through legacy disputes; or
* AFCA resolving legacy disputes of FOS and CIO under the terms of reference of the original scheme.

The Bill also provides the Government with the ability to require firms to join AFCA before it begins to hear disputes, enabling AFCA to raise the funds required to begin processing complaints, and makes clear that the SCT cannot receive new complaints once AFCA begins to receive disputes.

***Other amendments***

Consistent with the Ramsay Review recommendation, the Bill will be amended to enable the Australian Securities and Investments Commission (ASIC) to publish both aggregate and firm level data on internal dispute resolution activity. Publishing this data will increase transparency and accountability and will encourage financial firms to improve their internal dispute resolution practices.

The Bill will provide that, in line with current arrangements, AFCA’s decisions on non‑superannuation disputes are binding on the financial firm, but not on the consumer.

The Government will also require credit representatives to be members of AFCA after consulting on this issue, as recommended by the Ramsay Review.

***Bill structure***

To provide greater clarity about what the Government will consider before authorising AFCA and imposing any mandatory requirements on AFCA on an ongoing basis, the Bill will be structured into three divisions:

* Division 1: Authorisation of the external dispute resolution (EDR) scheme. This Division will set out the powers of the Minister (authorising the EDR scheme, imposing conditions on authorisation, varying or revoking the authorisation), the mandatory requirements of the EDR scheme (including appointing a minority of the Board when AFCA is established) and the general considerations for authorisation of the EDR scheme.
* Division 2: This Division will set out ASIC’s powers in regulating the AFCA scheme and AFCA’s reporting obligations to relevant authorities.
* Division 3: This Division will set out additional provisions required to resolve superannuation complaints and secrecy obligations of AFCA staff members in relation to information obtained under these provisions.

# Matters to be addressed in AFCA’s terms of reference

Under the new legislative framework, AFCA’s operating rules — known as its terms of reference — will set out the way in which AFCA will meet the requirements set out in the legislation.

***Monetary limits***

In line with the Ramsay Review recommendation, the Government has undertaken consultation on the monetary limits that AFCA should operate under, upon commencement.

The Government has decided that AFCA will commence operations with the following monetary limits:

* a monetary limit of $1 million and a compensation cap of $500,000 for most non‑superannuation disputes;
* unlimited monetary jurisdiction for superannuation disputes;
* no monetary limits and compensation caps for disputes about whether a guarantee should be set aside where it has been supported by a mortgage or other security over the guarantor’s primary place of residence; and
* a monetary limit of $5 million and a compensation cap of $1 million for small business credit facility disputes.

The Government expects that AFCA will commission an independent review of its monetary limits within 18 months of commencing operations.

***Enhanced decision-making***

In light of the increased monetary limits for non‑superannuation disputes, it is critical that AFCA has a robust and consistent approach to decision‑making. In order to achieve this, the Government will require AFCA to:

* adopt a consistent approach to decision-making;
* adhere to a principle of comparability of outcomes;
* publish its decisions in an anonymised form; and
* take into account previous FOS, CIO and SCT decisions, as appropriate.

AFCA’s decision-making criteria for non‑superannuation disputes will be based on achieving ‘fairness in all the circumstances’.

It is envisaged that AFCA will utilise expert decision‑making panels to resolve disputes where necessary. Factors that may need to be taken account when deciding whether to use a panel include:

* the complexity of the dispute;
* the amount of loss as well as other potential consequences of the dispute;
* whether the dispute raises a systemic issue; and
* whether the dispute is likely to be a ‘new’ decision that will set an industry standard in a particular context.

Dr Edey will consider when and how panels should be used.

***Ensuring AFCA is accountable to users***

In order to be effective, it is important that AFCA is independent and accountable.

AFCA will be held to account via a number of mechanisms, including the commissioning of regular independent reviews and having an independent assessor.

Commissioning regular independent reviews and having an independent assessor will be mandatory requirements in the Bill. However, the Government expects AFCA’s terms of reference to provide greater detail on how these mechanisms will be used to make AFCA accountable to all its users.

To ensure procedural fairness, AFCA should also have internal review mechanisms for dealing with complaints about its processes and procedures, such as its decisions regarding jurisdiction.

To ensure that AFCA remains accountable, the legislation provides ASIC with a general directions power to ensure that AFCA fulfils its mandate.

***Ensuring AFCA is accessible to users***

AFCA will be accessible and free for consumers and small businesses.

To further increase the accessibility of AFCA, the Government expects AFCA to undertake consumer and community outreach. As community outreach will be a core function of AFCA, the Government expects to see this function included in AFCA’s terms reference.

***Exclusions from AFCA’s jurisdiction***

AFCA’s terms of reference will outline what types of complaints it is unable to hear. While this is a matter to be further considered by the AFCA transition team, the Government expects the terms of reference to exclude disputes already heard by an existing external dispute resolution scheme or by a court, and superannuation complaints that deal with the management of a fund as a whole.

***Best practice governance and funding***

Given that under the new framework superannuation disputes will, for the first time, be resolved under an ombudsman scheme model, rather than a tribunal, the Government has determined that the initial AFCA board should have at least one director with superannuation experience and expertise. Dr Edey will take this into account as he develops and consults on draft governance arrangements for AFCA.

AFCA will also be required to adhere to industry practice corporate governance principles, including where appropriate the Australian Securities Exchange’s *Corporate Governance Principles and Recommendations*. The AFCA transition team will work on developing these governance principles.

In addition, Dr Edey will consider the best way for AFCA to raise the required funds from its members, given AFCA will be funded by industry.

***Appropriate internal dispute resolution processes***

To minimise AFCA’s workload and ensure that internal dispute resolution processes have the opportunity to work, the Government has decided that AFCA should refer all new complaints received back to the financial firm for a final opportunity to resolve the dispute in a defined timeframe (with the exception of death benefit complaints within superannuation, which are subject to legislative timeframes), subject to a discretion to exempt certain cases in limited circumstances.